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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953

No. 228

EMANUEL L. MAZER AND WILLIAM ENDICTER,
doing business as JUNE LAMP MANUFACTURING
COMPANY,

Petitioners,

vs.

BENJAMIN STEIN AND BENA STEIN, doing business
as Reglor of California,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

Petition for Rehearing

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*To the Honorable Earl Warren, Chief Justice of the United
States, and the Associate Justices of the Supreme Court
of the United States:*

The Petitioners respectfully pray that this Court grant
rehearing of its Judgment and Opinion of March 8, 1954
on the ground that in the words of the separate Opinion of
Justices Douglas and Black "An important constitutional
question underlies this case—a question which was stirred

on oral argument but not treated in the briefs." The principal Opinion (pages 5 to 7 inclusive) does not provide an answer to the constitutional question raised for general guidance.

The separate Opinion in the last paragraph points out "The interests involved in the category of 'works of art,' as used in the copyright law, are considerable. The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, book ends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays." In addition to the above, the Copyright Office also included examples of silverware and furniture (Copyright Office Brief, p. 70, 78). It is respectfully suggested that the future course of these considerable business interests will be seriously hampered by the doubt of constitutionality expressed in the separate Opinion. Lower courts would not venture to hold the Copyright Code unconstitutional as regards statuettes in view of the Opinion of this Court.

In the Petitioners' reply brief, page 10, we specifically denied that the copyrights in issue here were valid. The reasons given by the Petitioners for such invalidity are no longer tenable in view of the Opinion of this Court. However, the separate Opinion has substituted other and more fundamental reasons based upon the Constitution. It is respectfully submitted, therefore, that the question of validity of the copyrights in issue, which validity was denied by the Petitioners, is still open for a decision by this Court.

The Opinion of this Court on page 5 accepted the accuracy of the first paragraph of the question presented by Pe-

tioners.¹ The question propounded in the separate Opinion and implicit in the original question has been reduced to the lowest possible denominator—Can statuettes of dancing figures be copyrighted under the United States constitutional provision—"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," Art. 1, & 8, cl. 8?

The question raised in the separate opinion is not simply as to whether a statuette may be copyrighted under the provisions of the United States Constitution but whether copyright of such items as statuettes is not forbidden by the Constitution.

The constitutional basis for the copyright law resides in the constitutional clause given above. For the issue raised by the separate Opinion, the above constitutional provision may be reduced to "To promote the progress of science . . . , by securing for limited times to authors . . . the exclusive right to their . . . writings" The separate Opinion asks—Are statuettes (and other items enumerated in the last paragraph of the Opinion) "writings of an author" within the meaning of the Constitution?

The history of laws to protect intellectual property shows that statues and three dimensional objects of art had been classified prior to 1870 with patents for inventions.

The foundation of modern patent law is generally credited to the enactment in 1623 by Parliament in England of

¹"Can statuettes be protected in the United States by copyright when the copyright applicant intended primarily to use the statuettes in the form of lamp bases to be made and sold in quantity and carried the intentions into effect?"

the celebrated Statute of Monopolies (21 Jac. 1 ch. 3—Walker on Patents, Deller's ed. 1937, page 18). This abolished all monopolies and forbade the Crown to grant any monopolies in the future except as defined by Section 6 thereof. This Section 6 provided for the grants of Letters Patent for 14 years, or under, to the first inventor or inventors of new manufactures.

The first copyright statute is the famous Act of 8 Anne, c. 19, entitled "An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned." (Curtis on Copyrights, 1847, appendix page 1). This Act of 1710 pertained to books and "other writings" and did not cover sculpture, statues or three dimensional works of art. Statutory copyright protection in England was extended to prints in 1735 (8 George II c. 13—Curtis on Copyrights, 1847, Appendix p. 8). No statutory copyright protection was obtainable in England on sculpture or statuary until 1798, after the Constitution of the United States had been adopted. Thus prior to the adoption of the Constitution, "writings of an author" had a definite and well-established meaning in copyrights.

After the Colonies had gained their independence from England but prior to the adoption of the Constitution of the United States, twelve of the thirteen original states (Delaware was the exception) had copyright statutes limited to actual physical writings in the literal sense of the term. For convenience, a tabulation is herewith given.

CONNECTICUT—1783 entitled

"An Act for the encouragement of literature and genius".
Protected; Books; Pamphlets, Maps and Charts.

MASSACHUSETTS—1783 entitled

"An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for 21 years."

Protected; Books and Treatises.

MARYLAND—1783 entitled

"An Act respecting literary property".

Protected; Books and Writings.

NEW JERSEY—1783 entitled

"An Act for the promotion and encouragement of literature."

Protected; Books and Pamphlets.

NEW HAMPSHIRE—1783 entitled

"An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions for 20 years".

Protected; Books and Treatises.

RHODE ISLAND—1783 entitled

"An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for 20 years".

Protected; Books, Treatises and other Literary Productions.

PENNSYLVANIA—1784 entitled

"An Act for the encouragement and promotion of Learning by vesting a right to the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned".

Protected; Books and Pamphlets.

SOUTH CAROLINA—1784 entitled

"An Act for the encouragement of arts and sciences".

Protected; Books and Pamphlets.

VIRGINIA—1785 entitled

"An Act securing to the authors of literary works an exclusive property right therein for a limited time".

Protected; Books and Pamphlets.

NORTH CAROLINA—1785 entitled

"An Act for securing literary property".

Protected; Books, Maps and Charts.

GEORGIA—1786 entitled

“An Act for the encouragement of literature and genius”.
Protected; Books and Pamphlets.

NEW YORK—1786 entitled

“An Act to promote literature”.
Protected; Books and Pamphlets.

DELAWARE—Had no Copyright Law.

Some of the original states also had patent acts (Walker on Patents, Deller's ed. 1937 pages 28-32).

At the time the United States Constitution was adopted, the wording of the constitutional clause laying the basis for patent and copyright protection was provided with the background of copyright protection restricted to literary works only. This was in spite of the ancient art of sculpture and well-known methods of making copies. (20 Encyclopaedia Britannica (1948) p. 229; *Jungerson v. Ostby & Barton Co.* 335 U. S. 560) The constitutional language of “writings of an author” instead of the more comprehensive term “works of an author” or “products of an author” was thus deliberate and intended to exclude three dimensional works as sculpture and statues from the scope of copyright protection. It might be observed that photography was not known at that time.

It is significant that the constitutional clause considered here does not use “authors” alone. The definition contended for by the Copyright Office in its brief (page 10) would be broad enough to include “inventing” and thus render the word “inventors” in the constitutional clause unnecessary. By well-accepted rules of interpretation, the definitions of “authors” and “inventors” must be mutually exclusive. On that basis, “inventors” would cover three dimensional art

works such as sculpture and statuary while "authors" would be restricted to literary matters. The fact that "writings" is associated with "authors" adds weight to this interpretation.

The framers of the Constitution must have considered anyone who made a sculpture or statue as being an inventor who could obtain protection under patent statutes to be enacted. This view is borne out by the fact that the first Copyright Act of 1790 (1 Stat. 124) was limited to books, maps and charts and that no protection for sculpture and statues was possible until the enactment of the first Design Patent Act of 1842 (5 Stat. 543, Walker on Patents, p. 558). The inclusion of sculpture and statues as subject matter exclusively for design patents and not for copyright was maintained until 1870. In the 1870 Act, copyrights and design patent laws were consolidated. (16 Stat. 198, 212). For the first time in the history of the United States, statues were made the subject of copyright registration while still retaining their position as subject for design patent protection. The inclusion of statues as subject for design patent protection still exists, as Petitioners' booklet of Design Patents referred to in the Opinion indicates.

The question that the separate Opinion raises is whether the inclusion of statues in the field of copyright protection provided by the Act of 1870 was justified by the expression "writings of an author" derived from the Constitution. Historically, up to 1870, the inclusion of statues and statuettes as subject matter for copyright registration was not justified by the United States Constitution.

The line of demarcation between copyright and patents was further emphasized by the fact that in the same year

that the first Copyright Act was enacted (1790), the Patent Act of 1790 was enacted (1 Stat. at Large 109). This Patent Act is entitled "An Act to promote the Progress of **Useful Arts.**" This Act covered inventions or discoveries of a **useful art**, manufacture, and the like. (The above and later early patent statutes are found in Walker on Patents, Deller's ed. 1937 beginning with page 514.)

The patent protection was elaborated upon in the Patent Act of 1793 (1 Stat. at Large 318), the Act being entitled "An Act to promote the Progress of **Useful Arts**; and to repeal the Act heretofore made for that purpose." This Act related to inventions for any new and **useful art** and the like.

All of the subsequent Patent Acts, including the Design Patents, have purported to promote the progress of "useful arts." As an example, the first Design Patent Act of 1842 was entitled "An Act . . . to promote the progress of the **Useful Arts** . . ." (5 Stat. 543). The expression "**useful arts**" as used in the Constitution has always been found in patent enactments, whether for mechanical or for design patents. Obviously, sculpture and statuary come under "useful arts" and traditionally are included in the field of patent coverage only and not considered "writings of an author." Up to 1870, all "writings of an author" had never referred to any three dimensional work such as a statue.

The fact that this Court has not had to pass upon this question prior to the case at bar is due to the penal provisions of the copyright law rather than any positive acquiescence or recognition of the constitutionality of the inclusion of statues in the copyright law. If the copyright term of 28 years for a statue had been made the same as the term of a

design patent, then the inclusion of statues as subjects for copyright or design patent protection might be considered moot in view of the Opinion of this Court. However, the inclusion of statues in "writings of an author" fundamentally affects rights of the public. Hence the constitutional classification is of the utmost importance.

In this connection, it should be noted that "reproduction of works of art" in the copyright law, referred to in the Opinion p. 4, is a subject classification (e.g. photographs being reproductions of a picture or of a statue as a work of art) where a separate and distinct artistry from the original artistry present in the work of art is involved (see Reg. 13h of Copyright Office in force 1909-1949—Petitioners' Br., chart opposite p. 46)

"Reproduction of a work of art" obviously does not mean the manufactured product, as indefinite copyright under copyright classification (h) "Reproductions of a work of art" (Petitioners' Brief, chart opposite p. 46) would then be implied. Even the Copyright Office has not contended that "reproduction of a work of art" relates in any way to production, limited or not. (Copyright Office Brief, p. 19, 21). The language of the Opinion on page 5:

"The constitutional power of Congress to confer copyright protection on works of art or their reproduction is not questioned."

is believed to be a misapprehension of Petitioners' position, if "reproduction" means the same as in the sentence:

"'Reproduction of a work of art' does not mean to them unlimited reproduction."

on page 4 of the Opinion. This expression, "reproduction of a work of art," does not bridge the gap between copyrights and design patents as provided by the Constitution.

CONCLUSION.

It is therefore respectfully prayed that the Petitioners be granted the opportunity to be reheard.

Respectfully submitted,

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Max R. Kraus,

Counsel for Petitioners.

Chicago, Ill.

March 18, 1954.

CERTIFICATE OF COUNSEL.

The undersigned hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

Robert L. Kahn,

Max R. Kraus.